IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 493

LAKE CENTRAL AIRLINES, INC., *Petitioner*

v.

DELTA AIR LINES, INC., *Respondent*

(On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit)

REPLY BRIEF FOR PETITIONER, LAKE CENTRAL AIRLINES, INC.

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Subsequent to the filing of the petitions for a writ of certiorari in this and a related case (*Civil Aeronautics Board, Petitioner,* v. *Delta Air Lines, Inc.,* No. 492), the United States Court of Appeals for the District of Columbia Circuit entered its decision in *Truman Outland, et al., Petitioners,* v. *Civil Aero-*

nautics Board, No. 15489, decided October 27, 1960.[1] The Court there expressly disagreed with the decision of the Ninth Circuit in *Consolidated Flowers Shipments* v. *Civil Aeronautics Board*, 205 F. 2d 449, which held that a timely petition for reconsideration does not toll the 60-day statutory limit[2] for seeking judicial review. The Court of Appeals for the District of Columbia Circuit concluded in *Outland* that the time for seeking review runs from the time the Board enters its order denying petitions for reconsideration.[3] That

[1] This decision has not been reported; references herein to pages of the Court's opinion refer to the slip opinion.

[2] Title 49, U. S. C. § 1486(a).

[3] Page 7. The Court's full discussion of this question was as follows:

> "We shall treat first the question of timely filing of the petition for review because of its importance to orderly and efficient conduct of the Board's affairs. Both petitioner and the Board contend that a petition for judicial review of a Board order may be filed within 60 days after denial of a timely petition for reconsideration of the initial order. Title 49, U.S.C. § 1486(a) provides 'any order . . . issued by the Board . . . shall be subject to review . . . upon petition, filed within sixty days after the entry of such order . . . .' The Board calls attention to *Consolidated Flower Shipments, Inc.* v. *Civil Aeronautics Board*, 205 F.2d 449 (9th Cir. 1953), which held that a timely petition for reconsideration does not toll the 60 day statutory limit for seeking judicial review, but the Board's brief urges that 'Consolidated Flower was erroneously decided' and urges this court not to follow it.
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> In *State Airlines, Inc.* v. *Civil Aeronautics Board*, 84 U.S. App. D.C. 374, 174 F.2d 510 (1949), we reached the merits of a petition for review in circumstances where review would have been denied for want of a timely petition under the dictates of *Consolidated Flower, supra*. Prior to the Administrative Procedure Act we held, in *Braniff Airways, Inc.* v. *Civil Aeronautics Board*, 79 U.S. App. D.C. 341, 147 F.2d 152 (1945) that a petition for review was timely if filed within 60 days of denial of the motion for rehearing stating

decision necessarily indicates that the Board's jurisdiction to modify or amend its order and any certificate issued thereby is retained until the Board has finally acted upon pending petitions for reconsideration.[4] The *Outland* decision controverts Respondent's contention that a proceeding terminates, insofar as the Civil Aeronautics Board is concerned, when the certificates issued become effective, even though the Board has not completed its action upon timely petitions for reconsideration.

'we cannot review an order until administrative remedies have been exhausted.' *Id.* at 342, 147 F.2d at 153. See also *North Central Airlines, Inc.* v. *Civil Aeronautics Board*, 105 U.S. App. D.C. 207, 265 F.2d 581, *cert. denied*, 360 U.S. 903 (1959), and *Waterman S.S. Corp.* v. *Civil Aeronautics Board*, 159 F.2d 828 (5th Cir. 1947), *rev'd on other grounds sub nom. Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948).

Thus, while we have *sub silentio* indicated, since the passage of the Administrative Procedure Act, that a timely petition for reconsideration tolls the 60 day period for filing a petition for judicial review, we yield to the Board's urging to declare unequivocally what we have heretofore implied. With deference to the Ninth Circuit, which has held otherwise, we join the Fifth Circuit, *Waterman S.S. Corp.* v. *Civil Aeronautics Board, supra*, and affirmatively declare our conclusion to the contrary. *Cf. Skowhegan Sav. Bank* v. *Securities and Exchange Commission*, 91 U.S. App. D.C. 388, 201 F.2d 702 (1952). The legislative history of 5 U.S.C. § 1009(c) indicates that it was adopted to achieve harmony with the holding in *Levers* v. *Anderson*, 326 U.S. 219 (1945) to the effect that a motion for rehearing was not necessary to exhaust administrative remedies. However, while making judicial review available without a motion for rehearing, that statute did not operate to repeal the law with respect to finality. Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied, as we said in *Braniff Airways*,

[4] While *Outland* itself did not involve the grant of a certificate, nonetheless the authorities relied upon by the Court of Appeals in reaching the above conclusion were all certificate cases.

Thus, as previously indicated, there is a square conflict between the Ninth and the District of Columbia Circuits as to whether the Board retains jurisdiction over a proceeding until it finally disposes of petitions for reconsideration. This conflict constitutes an additional reason for granting the petitions in Nos. 492 and 493.

Petitioner is at a loss to understand Respondent's position as expressed in its brief in view of the undisputed fact that Respondent itself has heretofore contended before the Board that the certificate which the Board issued Respondent in this same proceeding could legally be modified in response to Respondent's own petition for reconsideration for the *removal* of a restriction imposed by the initial award, notwithstanding the fact the effective date of such award had passed. Several months after Respondent's certificate had become effective and while its petition for recon-

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Inc. v. *Civil Aeronautics Board, supra.* Section 1009 (c) does not command a motion for rehearing in order to reach finality by exhaustion of administrative remedies; it leaves that to each litigant's choice. But when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary. Practical considerations, therefore, dictate that when a petition for rehearing is filed, review may properly be deferred until this has been acted upon. The contrary result reached by the Ninth Circuit has caused parties to file so called 'protective' petitions for judicial review while petitions for rehearing before the Board were pending. A whole train of unnecessary consequences flowed from this; the Board and other parties may be called upon to respond and oppose the motion for review; when the Board acts, the petition for judicial review must be amended to bring the petition up to date.

We hold that when a motion for rehearing is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon by the Board."

sideration seeking modification thereof was still pending, Respondent in another Board proceeding was relying upon the Board's power to grant the requested modification in an effort to ward off a grant to another carrier. Upon being reminded of this by Petitioner in its answer to Respondent's request to the Board for a stay of the order here under review, Respondent replied that there was a difference between a grant of *additional authority* (i.e., through the removal of a restriction, which removal was opposed by other parties) and the taking away of authority first granted. (A.J.A. 1602a-1604a)

Respectfully submitted,

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